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NO. 80-1429

IN THE

SUPREME COURT OF THE UNITED STATES

October term 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF MENTAL HEALTH ADVOCACY SERVICES AND MENTAL HEALTH ASSOCIATION IN LOS ANGELES

JAMES PREIS
650 S. Spring St.
Suite 807
L.A., Ca. 90014
(213) 623-1419

*DAN STORMER
MARY BURDICK
Western Center on Law and Poverty, Inc.
3535 W. 6th St.
L.A., Ca. 90020
(213) 487-7211

*Counsel of Record

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT

Applicants ask leave of court to file an Amici Curiae Brief in support of Nicholas Romeo.

a. Interest of Amici Curiae.

Amicus Curiae Mental Health Association in Los Angeles is a non-profit

corporation of 1400 citizens concerned with the plight of the mentally ill. Among its members are prople who have recovered, as well as people who are presently suffering, from mental illness. In many circumstances Developmentally Disabled people also are mentally disabled. Amicus Curiae is, therefore, involved in both areas. The Mental Health Association has actively advocated and litigated in representing its members and their concerns. Among the issues litigated is a claim of right to treatment in the least intrusive manner based upon California state statutes (the Lanterman-Petris-Short Act which requires such treatment), the U.S. Constitution and the California Constitution.

Amicus Curiae Mental Health Advocacy Services is a non-profit corporation incorporated under the laws of California and

sponsered by the Los Angeles County Bar Association, the Beverly Hills Bar Association as well as the Mental Health Association in California. The purpose of Mental Health Advocacy Services is to represent and litigate the interests of the mentally and developmentally disabled citizens of California. The organization has been in existence since 1977 solely for the purpose of providing services to the mentally ill and developmentally disabled patients.

Both Amici are intensely concerned with the issues of this case as it will impact upon their members and the people they represent.

b. Argument Presented

Amici will argue that the nature of the deprivations are so fundamental that they require a compelling state interest or substantial necessity before they can be limited. Because 42 U.S.C. § 1983 exists to allow such claims for relief, the district court appropriately assumed jurisdiction to hear these claims based upon both federal and state created due process rights.

The plaintiff was properly confined for care and treatment under the appropriate Pennsylvania statutes. He was not confined to be beaten, shackled and denied treatment. This failure to provide for protection of Mr. Romeo's liberty interests is compensable. The Third Circuit's decision should be upheld in these areas.

The defendants request for qualified immunity is not appropriately before this court. It was neither argued nor decided by the court below and should not be decided in the Supreme Court for the first time.

Respectfully submitted,

DAN STORMER
Counsel for Amici

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AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT

ARGUMENT

THE THIRD CIRCUIT COURT OF APPEALS APPROPRIATELY ORDERED A REMAND FOR TRIAL WITH A JURY INSTRUCTION ON QUALIFIED IMMUNITY.

a. The District Court has jurisdiction to hear Mr. Romeo's damage claims for constitutional deprivations.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." Marbury v. Madison, 1 Cranch. 137, 163 (1803). If a federal statute provides a general right to sue for an invasion of a protected right, federal courts may use any "available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678,

684 (1946) 42 U.S.C. §1983 provides Mr. Romeo with the vehicle for suit and the federal court with the authority to hear his claims that he was denied due process protections as guaranteed under the U.S. Constitution.[1] A state cannot limit federal authority

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1/ 42 U.S.C. Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities assured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

when legitimate constitutional claims are made. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395 (1971); In Re Neagle, 135 U.S. 1 (1889). Because 42 U.S.C. § 1983 is available "[T]he federal question . . . (becomes) . . . an independent claim both necessary and sufficient to make out . . . (a) . . . cause of action." Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395 (1971).

In seeking relief a plaintiff is entitled to receive damages for constitutional deprivations because "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." Bivens v. Six Unknown Federal Narcotics Agents, supra, 403 U.S. at

395.[2/]

As will be shown, the Third Circuit rightfully found that violations of the Fourteenth Amendment were wrought upon Nicholas Romeo. A proper claim for relief in federal court is provided by 42 U.S.C. § 1983. The district court and subsequent appellate courts appropriately assumed jurisdiction.

2/ In Bivens the court set forth a list of authority for this proposition: Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536, 540 (1927); Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900); J. Landynski, Search and Siezure in the Supreme Court, 28 et seq. (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution, 43 et seq. (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, 8-33 (1968); cf. West v. Cabell, 153 U.S. 78 (1894); Lammon v. Feusier, 111 U.S. 17 (1884).

b. Fourteenth Amendment due process protections attach to the method, reasons, terms and conditions of confinement.

Involuntary confinement of an individual entails a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972).

As this court said in O'Connor v. Donaldson, 422 U.S. 563, 580 (1975):

> [T]here can be no doubt that involuntary commitment to a mental hospital like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law. Specht v. Patterson, 386 U.S. 605, 608 (1967).

In Vitek v. Jones, 445 U.S. 480, 487 (1980) this court stated that "[t]he loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."[3/] Because of the substantial impact that involuntary confinement for mental health reasons has upon those so confined, due process rights necessarily are implicated. Absent procedural compliance, "protected

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3/ The rights of prisoners are even more severly curtailed than the involuntarily committed because "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266 285 (1948). For the same proposition see Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); Wolff v. McDonnell, 418 U.S. 539 (1974) Pell v. Procunier, 417 U.S. 817 (1974).

liberty interests would be unconstitutionally infringed." Id. at 487.[4/]

Even though state law may permit confinement of the mentally ill that, by itself, does not establish a constitutionally adequate purpose for confinement. O'Connor v. Donaldson, supra, 422 U.S. at 574. "Due process requires that the nature and duration of commitment bears some reasonable relation to the purposes for which the individual is committed." Jackson v. Indiana, 406 U.S.

4/ See also Baxstrom v. Herold, 383 U.S. 107, 113 (1966); In re Winship, 397 U.S. 358, 363 (1970); Williams v. Illinois, 399 U.S. 235, 263 (1970); Muriel v. Baltimore City Municipal Court, 407 U.S. 355, 363 (1972) upholding similar due process interests.

715, 738 (1972).

A person has a substantial liberty interest in not being confined unnecessarily for treatment. Parham v. J.R., 442 U.S. 584 (1979).

Nicholas Romeo was committed under Pa. Stat. Ann. Tit. 50, § 4406.[5/]

5/ Pa. Stat. Ann. Tit. 50 § 4406:

(a) Whenever a person is believed to be mentally disabled, and in need of care or treatment by reason of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such person cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.

(b) If, upon examination, it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may order the commitment of such person for care and treatment. (Emphasis added.)

The statute clearly requires care and treatment. Likewise the Pennsylvania Supreme Court has required that those committed as mentally disabled must be provided care and treatment. In re Schmidt, ____ Pa. ____, 429 A.2d 631 (1981).

This state created right provides a constitutionally protectable liberty interest which is enforcible if the state does not provide such treatment. Jackson v. Indiana, supra, Paul v. Davis, 424 U.S. 693, 710 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970); Wolff v. McDonnell, 418 U.S. 539 (1974).

Due process also attaches because freedom from confinement is an "elemental liberty" Arnett v. Kennedy, 416 U.S. 134, 157 (1974).[6/] The terms and conditions of confinement must be for a legitimate purpose. O'Connor v. Donaldson, supra. A person who has not committed any crime may lose certain rights if confined as a result of mental illness or retardation; however, confinement solely for care is no different than the confinement for the status of being a narcotics addict found unconstitutional in Robinson v. California, 370 U.S. 660 (1962).

If the confinement does not provide proper care and treatment then that confined person has a due process "right to be free from, and to obtain judicial relief for, unjustified entrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977).

6/ In Speiser v. Randall, 357 U.S. 513, 525 (1958) liberty was described as "an interest transcending value."

If requested it is the obligation of the courts to view the confinement to see if constitutional terms and conditions are being met, as was done in O'Connor v. Donaldson, supra.

The protections of the Fourteenth Amendment apply to both the commitment process and the conditions of confinement once committed. Judicial relief may be sought and obtained for failures to abide by the mandates of due process.

c. Eighth Amendment.

Neither petitioner nor the respondent are contesting the Third Circuit's interpretation of Ingraham v. Wright, 430 U.S. 651 (1977) and Bell v. Wolfish, 441 U.S. 520 (1979) as precluding application of the Eighth Amendment.

d. The State cannot enfringe upon fundamental rights absent showing a compelling state interest.

Involuntary civil commitment of mentally disabled individuals in locked state institutions not only involves the obvious curtailment of freedoms of movement and travel but also massive infringement upon the First Amendment rights of free association and expression. An involuntarily committed mentally disabled individual's connections with the outside world are greatly restricted, if not severed. The individual is often subjected to treatment modalities, such as psychotropic medication, which affect thought processes and expression. Further, commitment may infringe upon the rights of marriage, procreation and voting.

The Supreme Court has found all of these rights fundamental for purposes of the due process clause and has strictly scrutinized state action which infringes these rights. See e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (marriage); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); Roe v. Wade, 410 U.S. 113 (1973)(decision to bear children); Kent v. Dullas, 357 U.S. 116 (1958); Apthekcer v. Secretary of State, 378 U.S. 500 (1964); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Bates v. Little Rock, 361 U.S. 516 (1960) (association); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (voting). This court has also recognized that constitutional rights arise because

of the severe social stigma arising from commitment for mental disability. Addington v. Texas, 441 U.S. 418, 425, 426 (1979).

When fundamental rights are infringed strict scrutiny demands that the state action be justified by a showing of compelling state interest. (See Roe v. Wade, 410 U.S. 113 (1973)). Further, even if the state can demonstrate a compelling state interest which justifies infringing the fundamental rights of involuntarily committed patients, infringements upon such rights must be carried out in the least drastic manner. The classic statement of the principle was made in Shelton v. Tucker, 364 U.S. 479, 488 (1960); even though the governmental purpose is legitimate and

substantial, that purpose cannot be pursued by means which broadly stifle fundamental personal liberties when the end can be more narrowly achieved. This principle has been part of the U.S. Supreme Court's analysis in almost every field of constitutional law, including substantive due process, Griswold v. Connecticut, supra, Roe v. Wade, supra; procedural due process, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 126, 163 (1951), the commerce clause, Dean Milk Co. v. Madison, 340 U.S. 349 (1951); and the First Amendment 'Overbreadth' cases, e.g., U.S. v. Robel, 389 U.S. (1967); Shelton v. Tucker, supra. See Bastress, The Least Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria, 27 Vand. L. Rev. 971 (1974). The principle was recently restated by

the U.S. Supreme Court in Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979):

> Our previous opinions have . . . emphasized that 'even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty, Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973), and we have required that state adopt the least drastic means to achieve their ends.

That this applies in the context of civil commitment was accepted by the U.S. Supreme Court in O'Connor v. Donaldson,

422 U.S. 503, 575 (1975).[7/] The Court reasoned that "the state has a proper interest in providing care and assistance to the unfortunate" but rejected the idea that commitment for care alone was sufficient grounds because commitment is "rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own, or with the help of family or friends." There must be a greater reason for confinement than a desire to better the situation of the committed person in order for confinement to be constitutional. The confinement must further a substantial government interest. Treatment is clearly such an interest.

7/ Congress has reaffirmed this principle of full citizenship in § 504 of the Rehabilitation Act of 1973, 87 Stat. 394 as amended 29 U.S.C. § 794. Congress has also provided the United States Attorney General with the authority to bring actions on behalf of institutionalized citizens who are being subjected to conditions which "deprive such

(footnote con'd on next page)

In O'Connor this court reviewed the terms and conditions of involuntary confinement; analyzing them in light of the due process protections which apply to the institutionalized mentally disabled. It recognized that the Fourteenth Amendment applies equally to the conditions of confinement as to the process by which someone is confined.

A fundamental interest can only be limited by a compelling state interest. Even if the state has a legitimate goal ("providing care and treatment") it will be denied the power to achieve that goal by using means which unnecessarily encroach upon fundamental rights.

The actions of the officials at Pennhurst hospital do not meet these constitutional standards.

(footnote con'd from previous page)
persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States..." 42 U.S.C. 1997(a), Public Law 96-247.

e. Nicholas Romeo was Denied The Protection of the Fourteenth Amendment in Three Separate Ways.

The Court of Appeals appropriately defined Romeo's claims in traditional due process terms: 1) a right to be free from undue bodily restraint; 2) a right to personal security and protection; and 3) a right to adequate treatment. The Court found that:

> The first two are undiluted legal concerns relating to protected liberty interests, as such, they are entitled to heightened judicial scrutiny. The third entails mixed questions of law and medical judgment, and thus requires a more flexible standard of judicial review and suitable deference to informed

medical opinion. Romeo v. Youngberg, 644 F.2d 147, 159 (1980).

The court, in reviewing the due process deprivation claims applied the tri-partate balancing inquiry set forth in Mathews v. Eldridge, 424 U.S. 319, (1976).[7]

In accepting certiorari this court changed the questions somewhat;[8] however, these are also reviewable under the traditional analysis.

1) A right to be free from undue bodily restraint.

Nicholas Romeo was shackled to his bed for long hours every day for at least

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7/ "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail." Id. 424 U.S. at 334-34.

8/ Whether an institutionalized mentally retarded person has a substantive due process right,

(footnote con'd on next page)

one year. The shackling was not aimed at any treatment -- rather it was merely an administrative convenience. The record appears to be bereft of any evidence that attempts were made to use a less harsh, severe and physically damaging restraint.

Even after committment a person has a due process right to be free from unreasonable physical restraint. Parham v. J.R., 442 U.S. 584, 600-601 (1979); Ingraham v. Wright, supra, 430 U.S. at 673-674.

(footnote cont'd from previous page)

> (a) to receive treatment that is both acceptable in light of present medical or other scientific knowledge and that is least instrusive treatment available under circumstances; (b) to be free of restraints, whether for treatment or protection, absent showing of compelling necessity, and (c) to be protected from harm, however caused, absent showing of substantial necessity?

Even prisoners, who suffer the curtailment of their liberty as a valid function of punishment, (see footnote 3/) have a right to be free from unnecessary bodily restraints. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18-19 (1979). Certainly defendants would not contend that committment can be used punitively. Addington v. Texas, supra, 441 U.S. at 428, makes it very clear that punishment is not a permissible reason for confinement of the mentally disabled.

Defendants might claim that the shackling was a form of treatment; however, it looks suspiciously like the "milieu therapy" offered the plaintiff in O'Connor v. Donaldson, supra. In that case the treatment offered was the "milieu" of a mental

hospital and nothing more. Id. 422 U.S. at 569. Like the "milieu therapy" found unacceptable in O'Connor the shackling of Nicholas Romeo is nothing more than administrative convenience cloaked in the guise of the "milieu of treatment by shackling."

If the shackling was a form of punishment as part of the committment process it would be unconstitutional. Addington v. Texas, supra. If it was treatment there has to be more than a bald assertion that an obviously major encroachment on physical liberty

is treatment. O'Connor v. Donaldson, supra. Finally, if it was mere administrative convenience this violates the substantive due protections created by the Fourteenth Amendment and the requirements of care and treatment of Pennsylvania statutes.

The plaintiff's liberty interests can only be limited upon a showing of a compelling state interest. The record is empty of any substantial or compelling state interest requiring such inhumane treatment.

The Third Circuit's opinion should be upheld in this area also.

2) A right to personal security and protection.

In a four year period Nicholas Romeo suffered seventy-seven injuries. Some of these were self-inflicted; the rest were the results of attacks by others. These were the recorded injuries in a institution so beset by administrative and operational problems. One can fairly reliably infer that there were many more injuries that went unreported.[9/]

Mr. Romeo has done nothing other than to be born into this world developmentally disabled. His only crime is that he needs care and treatment. Yet defendants seem to feel that whatever you are subjected to at Pennhurst is exactly that to which you are entitled, because the state's only obligation is, seemingly,

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9/ See Pennhurst v. Halderman, 612 F.2d 84 3d Cir. (1979) for a description of the decrepit facilities at Pennhurst State Hospital.

to keep you there. This court would never allow such treatment of prisoners. Hutto v. Finney, 437 U.S. 678 (1978); Bell v. Wolfish, supra, 441 U.S. at 520; Wolff v. McDonnell, supra. The Fourteenth Amendment will simply not allow such denials of a liberty interest (personal safety). Certainly this court cannot allow such atrocities to be concealed beneath the cloak of so-called "treatment" O'Connor v. Donaldson, supra.

The plaintiff has both an independent constitutional right to personal safety and treatment and a state-created right. In re Schmidt, supra. This liberty interest cannot be limited absent some substantial necessity. No such necessity has been shown. Financial concerns can be considered, but, they must be viewed in the light of the interest involved. No financial concerns have been offered in the record as it presently appears which

can justify 77 personal injuries in a four year period. The Third Circuit opinion should be upheld.

3) Right to Treatment.

This issue has been briefed extensively and very adequately by plaintiff as well as amici represented by the Mental Health Law Project. Present Amici will only note that the terminology used by defendants simply is an attempt to create an issue which is not present. The Pennsylvania statutes are very clear, as is the law, In re Schmidt, supra; i.e., an institutionalized person has a right to care and treatment. Those requirements alone can resolve this portion of the case. The district court could certainly review the denial of that state created due process right based upon traditional due process analysis.

f. Qualified Immunity.

"In order for an issue to be properly before the Court it must have been raised below." Procunier v. Navarette, 434 U.S. 555, 567 (1978), (Burger, C.J., dissenting). The defendants did not argue that they had a qualified right to immunity in the Court of Appeals. In Bivens v. Six Unknown Federal Narcotics Agents, this court determined that an issue not raised below could not be considered on appeal. As stated by Justice Brennen for the court, "this question was not passed upon by the Court of Appeals, and accordingly we do not consider it here." Id., 403 U.S. at 397, 398. Unlike in Procunier v. Navarette, supra, where the defendants claimed

a good faith defense, and where they could not reasonably have known that their actions were unlawful and, further, there was a record upon which to make this determination, in this case there was no such record nor were there any such claims of immunity by the defendants even though there was a full trial on the merits. For the court to consider the claims at this late date simply runs counter to the purpose of the Supreme Court. These issues should have been raised and briefed in a lower court based upon the factual presentations. Determination by the Supreme Court at this time is not appropriate.

CONCLUSION

The due process reasoning applied by the circuit court is simply a traditional analysis of fundamental liberty interests. It's findings may be in language which implies new constitutional standards; however, a rational examination clearly shows that the state, under traditional due process constraints, cannot confine someone for care and treatment and let that person be beaten, go untreated and be shackled, for days on end, to his bed. There was no showing of any compelling state interest, or any substantial need to confine the plaintiff in such an inhumane manner.

The Third Circuit's opinion should be upheld in its entirety.

Respectfully submitted,

DAN STORMER
MARY BURDICK
Western Center on Law
and Poverty, Inc.
3535 W. 6th Street
Los Angeles, Calif. 90020
(213) 487-7211

JAMES PREIS
Mental Health Advocacy
Services
650 S. Spring St., Suite 807
Los Angeles, Calif. 90014
(213) 623-1419

Attorneys for Amici Curiae

PROOF OF SERVICE

I, DAN STORMER, certify that on this day, September 23, 1981, true and correct copies of the foregoing were mailed, pursuant to Rule 28, Rules of the Supreme Court of the United States, by United States mail, to:

Edmond A. Tiryak
Community Legal Services
Law Center Northeast
3156 Kensington Avenue
Philadelphia, Pa. 19134

David H. Allshouse
Deputy Attorney General
Office of Attorney General
1641 Strawberry Square
Harrisburg, Pa. 17120

DATED: September 23, 1981

DAN STORMER
Attorney of Record
for Amici Curiae

Subscribed and sworn to before me this 23rd day of September , 1981.

Stephanie Barshefski